

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

KIMBERLY ANN EILAR,

Plaintiff and Respondent,

v.

DAVID FRANKENBERGER et al.,

Defendants and Appellants.

E071015

(Super.Ct.No. CIVDS1802330)

OPINION

APPEAL from the Superior Court of San Bernardino County. Thomas S. Garza, Judge. Affirmed in part; reversed in part.

David DL Horton Esq. & Associates, David D L Horton and Christopher W. Kelly for Defendants and Appellants.

Bullard & Powell, Sarah E. Powell; and Gary Wenkle Smith for Plaintiff and Respondent.

Plaintiff and respondent Kimberly Ann Eilar (Eilar) sued defendants and appellants David Frankenger (David) and Kellie Frankenger (Kellie)¹ for (1) malicious prosecution, and (2) intentional infliction of emotional distress. The trial court denied David and Kellie's (collectively, the Frankenbergers) anti-SLAPP motion. (Code Civ. Proc., § 425.16.)² The Frankenbergers contend the trial court erred by denying their anti-SLAPP motion. We reverse in part and affirm in part.

FACTUAL AND PROCEDURAL HISTORY

A. COMPLAINT

The facts in this subsection are taken from Eilar's complaint. The Frankenbergers owned a company named Fence It Up (the Company). In August 2011, the Frankenbergers hired Eilar to work for the Company. Also in August 2011, the Frankenbergers and Eilar entered into an oral contract for Eilar to purchase the Company from the Frankenbergers. In October 2011, the Frankenbergers filed a fictitious business statement with the County of San Bernardino reflecting Eilar owned the Company. Additionally, the Frankenbergers paid for legal documents to be created that reflected Eilar owned the Company.

In 2011 and 2012, Eilar made payments to the Frankenbergers for the purchase of the Company. Eilar completed the payments in 2012. Eilar maintained a bank

¹ We use first names for the sake of clarity, no disrespect is intended.

² All subsequent statutory references will be to the Code of Civil Procedure unless otherwise indicated.

account for the Company, paid the Company's bills, and paid the Company's employees. In 2012, Eilar made the Company profitable.

In 2012, the Frankenbergers reported that Eilar stole assets from the Company. In August 2013, Eilar was charged with grand theft (Pen. Code, § 487). The Frankenbergers testified against Eilar at a preliminary hearing. In September 2017, in the criminal case, the trial court found Eilar owned the Company and the Frankenbergers lied at the preliminary hearing. The criminal trial court dismissed the charges against Eilar. In January 2018, the criminal trial court made a finding that Eilar was factually innocent of the grand theft charge.

Eilar's first cause of action was for malicious prosecution. Eilar alleged that the Frankenbergers maliciously made the false report that Eilar stole assets from the Company. Eilar alleged the Frankenbergers misused the criminal legal system for their financial gain.

Eilar's second cause of action was for intentional infliction of emotional distress. Eilar alleged that the Frankenbergers made a false crime report against Eilar for financial gain and to cause Eilar "to suffer extreme humiliation, mental anguish, embarrassment, shame, and emotional distress." Eilar alleged that she suffered "tremendous anxiety and shock and injury to her nervous system." Eilar sought general, special, and punitive damages according to proof.

B. ANTI-SLAPP MOTION

The Frankenbergers brought an anti-SLAPP motion. The facts in this subsection are taken from the anti-SLAPP motion. The Frankenbergers hired Eilar as an office

manager and bookkeeper for the Company. In January 2013, another employee told the Frankenbergers that she suspected Eilar was embezzling. The Frankenbergers researched the Company's financial records and discovered Eilar "recorded a deceptive new business name for a business she called 'Fence It Up!' (with an exclamation point)," and Eilar opened a bank account using the name of the new business. Further, Eilar opened credit card accounts using Kellie's name and opened a PayPal account using the Frankenbergers' information. Eilar used the accounts to make personal purchases.

In January 2013, the Frankenbergers terminated Eilar's employment and reported their discoveries to the San Bernardino police. The police investigated and found Eilar deposited checks for the Company in a bank account she opened for Fence It Up! On May 13, 2016, the Frankenbergers testified against Eilar at a preliminary hearing. The criminal trial court found there was probable cause for the case to proceed. On September 27, 2017, during a pretrial conference in the criminal case, the criminal trial court dismissed the charges against Eilar based upon a finding that Eilar owned the Company.

In the anti-SLAPP motion, the Frankenbergers alleged Eilar's lawsuit arose from protected activity because Eilar's lawsuit was based upon the Frankenbergers (1) reporting Eilar's alleged conduct to the police; and (2) testifying about Eilar's alleged conduct. The Frankenbergers asserted Eilar was suing them for speech made in a pending judicial proceeding and speech made in anticipation of such a proceeding. (§ 425.16, subd. (e).) The Frankenbergers asserted they did not knowingly make a false

report to police. The Frankenbergers contended they contacted police only after researching Eilar's activities, and they believed their allegations against Eilar were true.

The Frankenbergers asserted Eilar could not demonstrate a likelihood of prevailing on the merits of the malicious prosecution cause of action because (1) the Frankenbergers discovered bank records reflecting Eilar was stealing from the Company; (2) the criminal trial court found probable cause for the criminal case to proceed; and (3) the police found evidence reflecting Eilar stole from the Company. The Frankenbergers contended they were not provided an opportunity to be heard in the criminal proceeding. The Frankenbergers asserted that Eilar's victory in the criminal court did not mean Eilar would automatically prevail on a malicious prosecution cause of action. The Frankenbergers asserted Eilar could not demonstrate a likelihood of prevailing on the merits of the emotional distress cause of action because the cause of action was barred by the litigation privilege. (Civ. Code, § 47, subd. (b).)

C. OPPOSITION

Eilar opposed the anti-SLAPP motion. Eilar asserted her lawsuit did not concern protected activity because the criminal trial court found the Frankenbergers lied, which amounted to perjury, and the Frankenbergers filed a false police report. Eilar asserted the criminal court found that Eilar was factually innocent. Eilar contended the Frankenbergers' illegal speech was not protected. Eilar asserted she could establish a likelihood of prevailing on the merits of the emotional distress cause of action because the litigation privilege does not apply to illegal conduct.

Eilar asserted she had a likelihood of prevailing on the merits of her malicious prosecution cause of action. Eilar asserted that, on October 17, 2011, Kellie paid Legal Zoom to transfer ownership of the Company from the Frankenbergers to Eilar. Additionally, in 2012, the California Contractors State License Board listed Eilar as the Company's general partner, further establishing Eilar's ownership interest in the Company. Eilar contended the evidence established that the Frankenbergers transferred ownership of the Company to Eilar, and they manufactured evidence against Eilar. Eilar asserted she could establish "there was no 'objectively reasonable' basis to initiate a criminal case" against her.

In regard to establishing malice, Eilar asserted the Frankenbergers took the Company's assets from Eilar, and they collected \$60,000 for an insurance claim they made based upon their lie that Eilar embezzled. Eilar argued malice would be established through evidence that the Frankenbergers were motivated by greed.

D. REPLY

The Frankenbergers replied to Eilar's opposition. The Frankenbergers asserted the criminal trial court's findings that the Frankenbergers lied could not be given conclusive/collateral estoppel effect against the Frankenbergers because the Frankenbergers were not given a full opportunity to be heard at the criminal proceeding.

The Frankenbergers asserted Eilar could not establish a probability of prevailing on the malicious prosecution cause of action because the Frankenbergers had probable cause to believe Eilar committed a crime. Further, the Frankenbergers asserted Eilar lacked foundation for the documents she would rely upon to prove the cause of action.

The Frankenbergers contended Eilar failed to authenticate the documents via a person with personal knowledge of the documents.

The Frankenbergers asserted Eilar could not establish a probability of prevailing on the merits of the emotional distress cause of action because it was barred by the litigation privilege. The Frankenbergers asserted, “[S]uch conduct is absolutely privileged under Civil Code section 47(b), even when the subject reports or testimony ‘are allegedly perjured and malicious.’ ”

E. HEARING

The trial court held a hearing on the anti-SLAPP motion. The trial court announced that its tentative ruling was to deny the motion. The trial court explained that the evidence established the Frankenbergers’ speech was illegal and therefore the Frankenbergers were “precluded from using the anti-SLAPP statute to strike [Eilar’s] action.”

The Frankenbergers asserted that Eilar’s victory in the criminal case was not binding on an allegation of malicious prosecution. The Frankenbergers argued, “[T]here would be millions of malicious prosecution plaintiffs walking around with judgments without any real proceeding or any opportunity of the defendant to respond,” if a victory in a criminal proceeding had collateral estoppel effect in a malicious prosecution case.

The trial court explained that the criminal trial court (1) found the Frankenbergers filed a false report, (2) found the Frankenbergers committed perjury, and (3) found Eilar to be factually innocent. The trial court explained that such

evidence “supports a malicious prosecution allegation.” The trial court found “that under the probability of the second prong that there is a prima facie showing.”

The Frankenbergers asserted the emotional distress cause of action should be barred by the litigation privilege. The trial court responded, “I feel . . . the litigation privilege is not applicable due to the fact that it’s illegal conduct. . . . I do agree with you that this may constitute an area of protected speech, but I think under these circumstances and facts, it’s distinguishable as best as I tried to explain it.” The Frankenbergers asserted they were not given a trial on a perjury charge and therefore, the criminal court’s finding of perjury was not binding. The trial court denied the anti-SLAPP motion. The trial court found the Frankenbergers had substantial justification to bring the anti-SLAPP motion and therefore did not award attorney’s fees to Eilar.

DISCUSSION

A. CONTENTION

The Frankenbergers contend the trial court erred by denying their anti-SLAPP motion.

B. LAW AND STANDARD OF REVIEW

“The anti-SLAPP statute does not insulate defendants from *any* liability for claims arising from the protected rights of petition or speech. It only provides a procedure for weeding out, at an early stage, *meritless* claims arising from protected activity. Resolution of an anti-SLAPP motion involves two steps. First, the defendant must establish that the challenged claim arises from activity protected by section 425.16. [Citation.] If the defendant makes the required showing, the burden shifts to

the plaintiff to demonstrate the merit of the claim by establishing a probability of success. [Our high court has] described this second step as a ‘summary-judgment-like procedure.’ ” (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384-385.) We apply the de novo standard of review. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325 (*Flatley*).)

C. PROTECTED ACTIVITY

We examine whether Eilar’s complaint concerns protected activity. A protected activity includes “any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law” and “any other conduct in furtherance of the exercise of the constitutional right of petition . . . in connection with a public issue or an issue of public interest.” (§ 425.16, subd. (e)(1)&(4).)

In Eilar’s complaint, she focuses on the Frankenbergers’ acts of (1) testifying at the preliminary hearing in her criminal case, and (2) making a report to the police. The act of testifying at a preliminary hearing is a protected activity because it consists of an oral statement made in a judicial proceeding. (§ 425.16, subd. (e)(1).)

The Frankenbergers’ act of making a report to the police is a protected activity because it consists of an act in furtherance of their right to petition the government in connection with a public issue. The report by the Frankenbergers to the police was an act of petitioning in that the Frankenbergers were petitioning the police to follow-up on the alleged crime. (*Chabak v. Monroy* (2007) 154 Cal.App.4th 1502, 1512 [“statement to the police arose from her right to petition the government and thus is protected activity”].)

The Frankenbergers' statement to police seeking to initiate a criminal investigation meets the "issue of public interest" element. The record reflects the police investigated the matter and Eilar was charged with a crime. Because a police investigation took place and a charge was filed, the Frankenbergers' statements to police triggering the criminal proceedings are a matter of public interest. (*Terry v. Davis Community Church* (2005) 131 Cal.App.4th 1534, 1547 [accusations of a crime become a matter of public interest when a criminal investigation results].)

In sum, Eilar's lawsuit concerns the Frankenbergers' acts of (1) testifying at the preliminary hearing, and (2) making statements to the police. Those acts constitute protected activities. (§ 425.16, subd. (e)(1)&(4).)

Eilar contends the Frankenbergers' acts are not protected activities because they were illegal acts. If a plaintiff's lawsuit concerns a defendant's "protected speech or petition rights, but either the defendant concedes, or the evidence conclusively establishes, that the assertedly protected speech or petition activity was illegal as a matter of law, the defendant is precluded from using the anti-SLAPP statute to strike the plaintiff's action." (*Flatley, supra*, 39 Cal.4th at p. 320.)

The Frankenbergers do not concede that their acts were illegal. Therefore, we consider whether the evidence conclusively establishes, as a matter of law, that the Frankenbergers' acts were illegal. The crime of perjury requires a showing that the witness knows his/her testimony is false. (Pen. Code, § 118.) At the hearing in which the criminal trial court dismissed the charges against Eilar, the court found the Frankenbergers committed perjury. However, there is nothing indicating the

Frankenbergers have been convicted of perjury. The finding, in Eilar's criminal case, that the Frankenbergers committed perjury is not res judicata in the current civil proceeding because the Frankenbergers were not parties in the criminal prosecution of Eilar. (*Hi-Desert Medical Center v. Douglas* (2015) 239 Cal.App.4th 717, 731 [res judicata requires the second suit involve the same parties].)

Eilar points to evidence that Kellie's credit card was used to pay for the legal documents transferring the Company to Eilar. While there may be evidence supporting Eilar's position that the Frankenbergers knowingly gave false testimony, the evidence does not conclusively establish, as a matter of law, that the Frankenbergers knew they were giving false testimony. In other words, there is evidence from which one could conclude that the Frankenbergers knowingly lied, but not evidence conclusively establishing that fact as a matter of law. Accordingly, the Frankenbergers' testimony at the preliminary hearing is a protected activity.

The crime of filing a false police report requires evidence that the person making the report knew the report was false. (Pen. Code, § 148.5, subd. (a).) There is nothing indicating the Frankenbergers have been convicted of filing a false police report. As set forth *ante*, Eilar has provided evidence that could support a finding that Kellie knew the police report was false. However, that evidence does not conclusively establish, as a matter of law, that Kellie knew she was lying when she reported Eilar's alleged crime. In other words, Eilar has provided persuasive, but not legally conclusive, evidence. Accordingly, the Frankenbergers' statements to the police are a protected activity.

D. LIKELIHOOD OF PREVAILING

We now turn to the second-prong of the anti-SLAPP analysis, which concerns Eilar’s likelihood of prevailing on the merits.

1. *LAW*

The second-prong is akin to a summary judgment analysis. (*Sweetwater Union High School Dist. v. Gilbane Building Co.* (2019) 6 Cal.5th 931, 940.) “ ‘The court does not weigh evidence or resolve conflicting factual claims. [Our] inquiry is limited to whether the plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment. [We] accept[] the plaintiff’s evidence as true, and evaluate[] the defendant’s showing only to determine if it defeats the plaintiff’s claim as a matter of law. [Citation.] “[C]laims with the requisite minimal merit may proceed.” ’ ” (*Ibid.*)

2. *MALICIOUS PROSECUTION*

“ ‘ “[I]n order to establish a cause of action for malicious prosecution of either a criminal or civil proceeding, a plaintiff must demonstrate ‘that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in [her], plaintiff’s, favor [citations]; (2) was brought without probable cause [citations]; and (3) was initiated with malice [citations].’ ” ’ ” (*Van Audenhove v. Perry* (2017) 11 Cal.App.5th 915, 919.)

“ ‘One may be civilly liable for malicious prosecution without personally signing the complaint initiating the criminal proceeding.’ [Citation.] ‘The test is whether the defendant was actively instrumental in causing the prosecution.’ [Citations.] ‘Cases

dealing with actions for malicious prosecution against private persons require that the defendant has at least sought out the police or prosecutorial authorities and falsely reported facts to them indicating that plaintiff has committed a crime.’ ” (*Greene v. Bank of America* (2013) 216 Cal.App.4th 454, 463-464.)

In Kellie’s declaration she declared that she and David contacted the police to report Eilar’s alleged crime. Kellie also declared that she and David met with a police detective. A reporter’s transcript of Eilar’s preliminary hearing reflects the Frankenbergers testified as prosecution witnesses. The foregoing evidence reflects the Frankenbergers’ were instrumental in the commencement of the criminal proceedings because they triggered the police investigation and followed through with the criminal proceedings by meeting with a detective and testifying at the preliminary hearing.

The criminal proceedings terminated in Eilar’s favor because the charge was dismissed (Pen. Code, § 1385) and she was found to be factually innocent of the charge (Pen. Code, § 851.8, subd. (c)). Eilar provided (1) a reporter’s transcript of the dismissal, and (2) a written order reflecting the finding of factual innocence.

As to probable cause, Eilar provided evidence of (1) a fictitious business name statement recorded in October 2011 reflecting Eilar was the owner of Fence It Up!; (2) an October 2011 receipt from Legal Zoom reflecting a Discover credit card ending in 1750 was used to pay for the DBA paperwork for Eilar; (3) an October 2011 Discover credit card bill addressed to Kellie for an account ending in 1750 and including a charge from Legal Zoom; and (4) a printout from the California Contractors

State License Board website reflecting that, in March 2012, Eilar was the general partner for the Company while David was the qualified contractor for the Company.

From the foregoing credit card evidence, one could conclude that Kellie paid for Eilar's DBA paperwork for the Company and therefore Kellie was aware that Eilar became the owner of the Company. From the State License Board evidence, one could conclude that David was aware that Eilar became the owner of the Company. Due to the Frankenbergers being aware that Eilar owned the Company, one could reasonably conclude that the Frankenbergers lacked probable cause to report that Eilar embezzled from the Company. In sum, there is prima facie evidence of a lack of probable cause.

“ ‘ “Malice” means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.’ ” (*George F. Hillenbrand, Inc. v. Insurance Co. of North America* (2002) 104 Cal.App.4th 784, 815.) Eilar provided a letter from an insurance company reflecting the Frankenbergers received \$50,000 from the Company's insurance policy because the Company had “employee dishonesty coverage.” A printout from the website for the California Contractors State License Board reflects numerous violations for the Company, such as a failure to secure Workers' Compensation coverage for employees.

One could reasonably infer from the foregoing evidence that the Company was struggling due to the numerous contractor's license violations. The Frankenbergers sold the Company to Eilar, took her money, and then reported Eilar for embezzling in order to obtain more money from the insurance company. A trier of fact could reasonably

conclude the Frankenbergers acted despicably by knowingly reporting a false crime for the purpose of obtaining money. Thus, Eilar provided prima facie evidence of malice. In sum, Eilar provided prima facie evidence for her malicious prosecution cause of action.

The Frankenbergers contend Eilar failed to demonstrate a probability of prevailing on the merits of the malicious prosecution cause of action because “the Frankenbergers had abundant reason to believe Eilar had committed a fraud against them.” At this stage of the proceedings we are only evaluating the Frankenbergers’ defense evidence to see if it defeats Eilar’s evidence as a matter of law. (*Sweetwater Union High School Dist. v. Gilbane Building Co.*, *supra*, 6 Cal.5th at p. 940.) If the Frankenbergers have evidence to support their position that they had probable cause to suspect Eilar committed a crime, then that would create a factual dispute, but it would not defeat Eilar’s evidence as a matter of law. Therefore, we find the Frankenbergers’ argument to be unpersuasive.

3. *INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS*

The Frankenbergers contend Eilar cannot prevail on the merits of her intentional infliction of emotional distress cause of action because the claim is barred by the litigation privilege (Civ. Code, § 47, subd. (b)).

“ ‘The principal purpose of [Civil Code] section [47, subdivision (b)] is to afford litigants and witnesses [citation] the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions.’ ” (*Flatley*, *supra*, 39 Cal.4th at p. 321-322.) “[T]he privilege is ‘an “absolute” privilege, and it bars all tort

causes of action except a claim of malicious prosecution.’ [Citation.] The litigation privilege has been applied in ‘numerous cases’ involving ‘fraudulent communication or perjured testimony.’ ” (*Id.* at p. 322.)

Eilar’s emotional distress is alleged to have been caused by the Frankenbergers’ perjury and false police report. Thus, Eilar is seeking damages for the Frankenbergers’ acts associated with the criminal case. Eilar’s emotional distress cause of action is barred by the litigation privilege because that privilege bars any cause of action other than malicious prosecution for allegedly wrongful acts associated with litigation. (*Carden v. Getzoff* (1987) 190 Cal.App.3d 907, 915.) As a result, Eilar has not demonstrated a probability of prevailing on the emotional distress cause of action.

Eilar contends the litigation privilege is inapplicable because the Frankenbergers’ speech was illegal. Eilar relies upon *Lefebvre v. Lefebvre* (2011) 199 Cal.App.4th 696, to support her position. That case provides: “Because Alice does not contest that she submitted an illegal, false criminal report, ‘[w]e end our review here. [Citations.] We agree with Alice that the privilege established in Civil Code section 47 has been applied in numerous cases that involved false reports or perjured testimony, but find this legal proposition is irrelevant for purposes of the first step of the anti-SLAPP procedure. Alice may have a valid privilege-based defense which she may present in another procedural context, but such a defense may not be presented by way of an anti-SLAPP motion. The defense could be presented in the context of an anti-SLAPP motion only if the act upon which Jon sued was a protected activity within the meaning of the anti-SLAPP statute.” (*Id.* at pp. 705-706.)

Lefebvre reflects the litigation privilege is not a proper defense under the first-prong of the anti-SLAPP analysis. In the instant discussion, we are addressing the second-prong of the anti-SLAPP analysis. To that end, the portion of *Lefebvre* that we find relevant is the portion that reads, “We agree with Alice that the privilege established in Civil Code section 47 has been applied in numerous cases that involved false reports or perjured testimony.” Because we are addressing the second-prong of the anti-SLAPP analysis, we find Eilar’s reliance on *Lefebvre* to be unpersuasive. The emotional distress cause of action is barred by the litigation privilege. (Civ. Code, § 47, subd. (b).)

E. REQUEST TO DISMISS

Eilar requests this court dismiss the appeal because the Frankenbergers’ appellants’ opening brief was due on Friday, November 16, 2018, but the Frankenbergers did not file their opening brief until Monday, November 19. It is possible the Frankenbergers electronically filed their brief after 5:00 p.m. on Friday, November 16, and therefore, it was not entered into the Court’s system until Monday, November 19. Eilar asserts she did not receive a copy of the opening brief until December 10; however, she does not explain what prejudice, if any, she suffered as a result of these delays. Because there is no discussion of harm resulting from these delays, we deny Eilar’s request to dismiss the appeal.

F. ATTORNEYS’ FEES

The Frankenbergers contend they should be awarded attorneys’ fees for the motion in the trial court and the appeal in this court.

“A defendant prevailing on a special motion to strike is entitled to recover his or her attorney fees and costs for the motion. [Citation.] Where the motion is partially successful, the question is whether the results obtained are insignificant and of no practical benefit to the moving party. [Citation.] A court awarding fees and costs for a partially successful anti-SLAPP motion must exercise its discretion in determining their amount in light of the moving party’s relative success in achieving his or her litigation objectives.” (*Cole v. Patricia A. Meyer & Associates, APC* (2012) 206 Cal.App.4th 1095, 1123.) “Any fee award must also include those incurred on appeal.” (*Trapp v. Naiman* (2013) 218 Cal.App.4th 113, 122.)

Eilar’s two causes of actions concerned the same activity by the Frankenbergers: (1) testifying at the preliminary hearing, and (2) making a report to the police. By defeating the emotional distress cause of action, the Frankenbergers have gained little benefit. The same discovery will need to be conducted, the same damages will be litigated, and the same issues will arise in trial because the causes of action concerned the exact same acts. Accordingly, because the results obtained by the Frankenbergers’ are of almost no practical benefit, we decline to award attorneys’ fees to the Frankenbergers, and we will not direct the trial court to consider an award of attorneys’ fees at the trial level.

DISPOSITION

The trial court’s order is reversed as to the second cause of action for intentional infliction of emotional distress. The trial court is directed to enter an order granting the anti-SLAPP motion as to the second cause of action. In all other respects, the judgment

is affirmed. The parties are to bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(3).)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

RAMIREZ
P. J.

CODRINGTON
J.